

STATE OF NORTH CAROLINA
COUNTY OF RANDOLPH

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
07 EDC 1390

Student by parent or guardian *Parent*,
Petitioner,

v.

FINAL DECISION

RANDOLPH COUNTY SCHOOLS
BOARD OF EDUCATION,
Respondent.

THE ABOVE-ENTITLED MATTER was heard before the undersigned Administrative Law Judge, Augustus B. Elkins, on October 18-19 and November 15, 2007 in Asheboro, North Carolina.

APPEARANCES

For Petitioner: *Parent*
 Parent on her own behalf

For Respondent: Donna R. Rascoe
 Cranfill, Sumner & Hartzog, LLP
 Post Office Box 27808
 Raleigh, North Carolina 27611-7808
 Attorney for Respondent

ISSUES

1. Whether Respondent offered *Student* a free appropriate public education in the least restrictive environment?
2. Whether *Student* was properly identified as eligible for services in the category of Behaviorally-Emotionally Disabled?

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents and exhibits received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interest, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

1. Petitioner *Parent* is a resident of Randolph County, North Carolina, and is the mother of *Student*. *Student*'s date of birth is ***, 2000 and, at the time of this contested hearing, he was 7 years old.

2. An Exceptional Children Referral was completed for *Student* on March 3, 2004 when he was enrolled in preschool in the Randolph County Schools. Referral concerns were difficulty following directions, cries easily, overly sensitive, temper tantrums, difficulty using and understanding language, indistinct articulation-speech sounds omitted, substituted or distorted, and biting nails. Respondent also received information that *Student* was noncompliant, aggressive and displayed anxious behaviors at daycare (Tr. Vol. I, pp. 27-28; Resp. Ex. 1 and 2)

3. In March 2004, *Student* was found to be eligible for special education services in the category of Speech Impaired. An evaluation done at that time found *Student* to have preacademic skills within an age appropriate range of development but he exhibited articulation errors which affected his speech intelligibility. (Tr. Vol. I, pp. 29-30; Resp. Ex. 4 and 5)

4. *Student* received special education services to address his speech impairment beginning in March 2004 and continuing through the 2004-05 and 2005-06 school years. (Tr. Vol. I, pp. 30-31; Resp. Ex. 7)

5. The Counseling Center of Greensboro completed a psychological evaluation for *Student* in December, 2005. *Student* was referred for this evaluation by Sandhills Center where he was being treated for severe behavioral problems including aggression. During the first two evaluation sessions, *Student* would not cooperate and the testing had to be suspended until a later time. The testing was completed in November, 2005 and the results showed that *Student* had a full scale IQ in the borderline range. His verbal and nonverbal reasoning skills were consistent with borderline intellectual functioning. (Resp. Ex. 8)

6. *Student* demonstrated behavior problems during the 2005-06 school year when he was in kindergarten. He had difficulty following class routines and following directions especially during transition periods. In May, 2006, goals and objectives were added to *Student*'s individualized educational program ("IEP") to address these concerns. (Tr. Vol. I, pp. 34; Resp. Ex. 10)

7. For the 2006-07 school year, *Student* was initially identified as Speech Impaired and was served in a regular education 1st grade class at F. Elementary School. Ms. D. was his teacher. (Tr. Vol. III, p. 6)

8. In the classroom, *Student* had trouble participating in small group and large group activities. *Student* demonstrated that he could complete most academic tasks, but he often refused to complete his work. *Student* often blurted out during class time so that the teacher was

not able to give directions to the class or continue the lesson. (Tr. Vol. III, pp. 8-15, 32-36; Resp. Ex. 57, 62)

9. *Student's* behavior in the classroom included "shut-downs" where he would have a blank stare and would not interact with anyone. At other times, *Student* would crawl under tables or chairs, roll across the floor, and put his head in cubbies and refuse to come out. *Student* also had more aggressive shut-downs where he would scream, kick the walls, yell, beat the walls with his hands or fists and grab onto things in the classroom. There were incidents where *Student* hit or threw items and struck other students. Sometimes *Student* would go limp and refuse to move so that he had to be carried to the office. These shut-downs occurred during academic and non-academic portions of the school day. (Tr. Vol. III, pp. 20-23; Resp. Ex. 61, 63, 65)

10. Ms. D. attempted several strategies to address *Student's* behavioral problems in her classroom. These included social skills lessons, positive support and implementation of a behavior plan. *Student* also had one-on-one assistance in the classroom. *Student* did not demonstrate a significant change in behavior in response to these strategies. (Tr. Vol. III, pp. 24-27; Resp. Ex. 20, 63-65)

11. Mr. K.G. is a Crisis Intervention Assistant with the school district and was one of three such assistants who worked in the classroom with *Student* during the 2006-07 school year. Mr. K.G. observed many behavioral problems with *Student* including *Student* sliding out of his desk and slithering around on the floor, trying to climb into cubby holes, verbal outbursts, physical outbursts, screaming, yelling, and hitting others. Mr. K.G. was involved in the implementation of the behavior plan for *Student*. Mr. K.G. attempted to identify precursors for *Student's* behavior but could never determine when behaviors were going to happen or how long they were going to last. (Tr. Vol. I, pp. 144-158)

12. Mr. T. is the principal of Elementary School A. During the 2006-07 school year, he had many interactions with *Student* regarding behavioral issues in school. Mr. T. observed shutdowns in which *Student* became unresponsive and others in which *Student* was more aggressive and hit and kicked Mr. T., teachers, other staff and students. Sometimes *Student* had to be taken to the office where efforts were made to have him complete work and then return to class. *Student* did not often respond to these efforts. Mr. T. observed behavioral incidents in the classroom and elsewhere in the school including the before and after school program. Mr. T. issued three out-of-school suspensions for *Student* as a result of these behavioral incidents. (Tr. Vol. I, pp. 74-83; Resp. Ex. 32, 58-60)

13. On September 28, 2006, the IEP team met to discuss possible reevaluation for *Student*. The team determined that more evaluation information was needed about *Student's* behavior and learning style. The team also discussed strategies for behaviors and decided to continue *Student's* behavior plan. (Tr. Vol. I, p. 37; Resp. Ex. 12)

14. On October 4, 2006, *Student's* therapist, Ms. P. from Randolph Counseling Center, wrote to *Parent* to provide information about *Student's* progress in therapy. *Parent* then provided this information to school officials. In her letter, Ms. P. stated that *Student* was in therapy to address his attitude, anger management, and improving his attention span and

concentration at home and in school. At that time, *Student* was diagnosed with Adjustment Disorder of Emotions and Conduct and Attention Deficit Hyperactivity Disorder, Combined Type. (Tr. Vol. I, pp. 37-38; Resp. Ex. 15)

15. On October 13, 2006, the IEP team met to discuss *Student's* behavior. The team discussed that *Student* had difficulty with transitions and developed a new behavior plan for him. (Tr. Vol. I, p. 39; Resp. Ex. 18)

16. Also in October, 2006 Respondent had its behavioral specialist, Mr. R.C., observe *Student* and make some recommendations for additional strategies to be implemented in the classroom. Mr. R.C. also assisted the IEP team in revising *Student's* behavior plan and in reviewing data collected through implementation of the plan. Mr. R.C. concluded that there was no noticeable change in *Student's* behavior in response to the strategies used in the classroom. (Tr. Vol. I, pp. 116-125)

17. On November 9, 2006, the IEP team began the formal process of considering *Student's* eligibility for services in addition to the speech impaired services he had been receiving. A classroom observation was done and documentation of strategies attempted in the regular classroom was reviewed. This documentation showed that there was not significant change in *Student's* behavior with the implementation of various strategies including instruction in social skills, implementation of a behavior plan, and immediate positive support. (Tr. Vol. III, pp. 24-27; Resp. Ex. 17, 20)

18. On November 9, 2006, Respondent completed its Psychoeducational Report. The purpose of this evaluation was to examine behavioral issues that were affecting *Student's* learning. Background information for this evaluation showed that *Student* had previously been diagnosed with Adjustment Disorder with Mixed Disturbance of Emotions and Conduct Disorder, Oppositional Defiant Disorder, and a Developmental Articulation Disorder. Prior testing at the Counseling Center of Greensboro found his intellectual skills to be in the borderline range. He was seeing a therapist and working on various behavioral and emotional issues. (Tr. Vol. III, pp. 169-171; Resp. Ex. 21)

19. *Student* displayed atypical behaviors during the testing for the November 2006 evaluation. In the classroom setting, he was observed to be significantly delayed in transitioning between activities. In the testing sessions, he needed short work sessions and numerous breaks. He also demonstrated a lot of movement including standing up, getting on the floor and crawling under chairs and in and out of chairs. (Tr. Vol. III, pp. 172-174)

20. Testing completed by Respondent in November 2006, found that *Student's* overall intellectual skills were in the average range. On achievement testing, *Student's* written expression skills were found to be in the average range. His visual motor skills were at the low end of the average range. Behavior screening found that *Student* had clinically significant symptoms and that he stood out from his peers in both the home and school environments. The behavior ratings that were of most concern were those related to Hyperactivity, Aggression, Conduct Problems, Atypicality, Withdrawal, and Adaptability. (Tr. Vol. III, pp. 176-186; Resp. Ex. 21)

21. The IEP team met again on November 14, 2006 to discuss evaluation results, conduct a Functional Behavioral Assessment (“FBA”), and review the behavior plan. The FBA concluded that when demands are placed on *Student* in large group settings, he exhibits non-compliant behaviors in order to escape or avoid tasks, activities, and transitions. The team revised *Student*’s behavior plan to address his problems with redirection in the office. (Resp. Ex. 22, 23)

22. On December 5, 2006, the IEP team met and continued its discussion of evaluation results and considered amending *Student*’s IEP. Among the information the IEP team considered was a Social-Developmental History Form completed by *Parent*. Information on this form indicated that *Student* had experienced a number of behavior problems for three and one half years and that he did not respond to discipline techniques. The team determined that *Student*’s area of eligibility should be changed from Speech Impaired to Behaviorally-Emotionally Disabled. *Parent* agreed with this determination. The team also added counseling as a related service and changed his speech impaired services to a related service. (Tr. Vol. I, p. 44, pp. 186-187; Resp. Ex. 24, 26 – 28, 50)

23. On December 6, 2006, a neurodevelopmental evaluation was completed at the Developmental and Psychological Center at Moses Cone Health System in Greensboro, North Carolina. For this evaluation, *Student* was described as having difficulty with focusing and with aggressive behaviors. Evaluation results found that *Student* showed poor graphomotor control; had some difficulty with reversals; and, had difficulty with language skills. *Student* was described as having difficulties with attention. He demonstrated cognitive fatigue and shut down which resulted in irritability and aggressive behaviors. *Student* was diagnosed with Dysgraphia, ADHD-combined, and Mild anxiety. (Resp. Ex. 30)

24. Ms. L. began serving *Student* as his resource teacher in December 2006 and worked with him for one hour each day in the special education classroom. In the resource room *Student* would sometimes refuse to participate, refuse to complete assignments, make noises, crawl on the floor and under the table and the chairs of other students. At other times, he participated in group activities and even took a leadership role with the other students. Ms. L. implemented *Student*’s behavior plan in the resource room. (Tr. Vol. I, pp. 253-259, 263-266)

25. The IEP team met on December 20, 2006 to review behavioral data collected since its prior meeting. The team considered several specific strategies for continuing to help *Student* deal with transitions. The team also considered a separate setting for *Student* but decided to examine this further at the next meeting. (Tr. Vol. I, pp. 48-50; Resp. Ex. 33, 65)

26. On January 30, 2007, Respondent conducted an Occupational Therapy Evaluation because of *Student*’s resistance to engage in written output assignments. This evaluation found that *Student* did not have significant problems with fine motor skills and he had a mature hand grip. The evaluation concluded that *Student* did not present with any handicapping condition that would affect his ability to motorically produce written output. Occupational therapy services were not recommended. (Tr. Vol. I, pp. 233-242; Resp. Ex. 34, 37)

27. On February 5, 2007, the IEP team met to discuss the results of the Occupational Therapy Evaluation and to review behavioral data and academic progress. The IEP team concluded that *Student* continued to be eligible for services and that he met the criteria for Behavioral-Emotional Disability (“BED”). *Parent* agreed with this decision and signed the eligibility documentation to that effect. The IEP team also discussed that *Student* was exhibiting many refusals to complete assignments and that it took a lot of interventions in order for him to complete math and reading assignments. The IEP team decided that *Student*’s placement should be changed from a regular classroom to a separate classroom and that transportation should be added as a related service. (Tr. Vol. I, pp. 52-53, Vol. III, pp. 41-42; Resp. Ex. 39-41)

28. The IEP team reconvened on March 5, 2007 to continue to discuss the change of placement for *Student*. This IEP meeting was facilitated by a representative from the North Carolina Department of Public Instruction. After a discussion of *Student*’s behavior and various factors that might be affecting his behavior, the IEP team agreed to increase *Student*’s time in the resource classroom rather than moving him to a separate setting. The team also agreed to *Parent*’s request for additional testing. ((Tr. Vol. I, pp. 55-57, Vol. III, pp. 44-45; Resp. Ex. 43, 44)

29. At *Parent*’s request, an Independent Educational Evaluation (“IEE”) was completed by Cornerstone Psychological Services in April 2007. *Parent* expressed concerns about *Student*’s behavior, academic performance and a possible learning disability. This evaluation was begun on April 9, 2007 but had to be rescheduled because of *Student*’s behavioral problems including his refusal to complete tasks. Test results found that *Student*’s intelligence was in the average range. His reading and writing skills were average and his math reasoning skills were high average. The examiner concluded that these results did not indicate the presence of a learning disability. (Resp. Ex. 47)

30. On June 12, 2007, the IEP team met to conduct an annual review of *Student*’s IEP. At this meeting, the team also considered the results of the IEE and completed an eligibility report for learning disability. The IEP team concluded that *Student* did not meet the criteria for LD and that he continued to be properly identified as BED. The IEP team was not able to reach a consensus on placement. The school district therefore proposed a placement in a separate classroom at J.L. Elementary School. The proposed placement included transportation and counseling as related services. (Tr. Vol. I, pp. 57-61, 196-199, Vol. III, pp. 41-42; Resp. Ex. 52, 53, 56)

31. The school district provided *Parent* Prior Written Notice of the proposed change of placement to the separate setting. *Parent* expressed her disagreement with the proposed placement and did not sign the IEP. (Resp. Ex. 55)

BASED UPON the foregoing Findings of Fact and upon the preponderance or greater weight of the evidence in the whole record, the undersigned makes the follow:

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings has jurisdiction of this contested case pursuant to Chapters 150B and 115C of the North Carolina General Statutes and the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and implementing regulations, 34 C.F.R. Part 300.

2. *Student* is a child with a disability pursuant to N.C. Gen. Stat. § 115C-106.3 and is entitled to receive a free appropriate public education (FAPE) pursuant to the IDEA, 20 U.S.C. § 1412(a)(1); 34 C.F.R. 300.121, and the North Carolina General Statutes and the North Carolina Procedures Governing Programs and Services for Children with Disabilities.

3. Petitioner has the burden of proof in this case. *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L.Ed. 2d 387 (2005).

4. The Petitioners have the burden of proof by a preponderance or a greater weight of the evidence regarding the issues enumerated above. Black's Law Dictionary cites that "preponderance means something more than weight; it denotes a superiority of weight, or outweighing." The finder of fact cannot properly act upon the weight of evidence, in favor of the one having the *onus*, unless it overbears, in some degree, the weight upon the other side.

5. Under the IDEA, local educational agencies (LEA) must ensure that a reevaluation of a child with a disability is conducted if the LEA determines that the educational performance or related service needs of the child warrant a reevaluation. When the LEA has completed the evaluation, a team of qualified professionals and the parent must determine whether the child is a child with a disability as defined by the IDEA.

6. A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. The results of the independent educational evaluation as well as the results of an evaluation obtained by the parent must be considered by the LEA in any decision related to the provision of FAPE to the child. 34 C.F.R. 300.502.

7. In this case, Respondent appropriately determined that a reevaluation was needed for *Student* in the fall of 2006 to examine behavioral issues that were affecting his learning. Respondent conducted a reevaluation and the IEP team considered this evaluation, other evaluation information provided by Petitioner as well as the results of an independent educational evaluation completed at Petitioner's request.

8. At the conclusion of the reevaluation process, Respondent appropriately determined that *Student* was eligible for services under the IDEA as a child with a disability in the category of Behaviorally-Emotionally Disabled.

9. *Student* is entitled to the preparation and implementation of an Individualized Education Program ("IEP") as defined in G.S. 115C-106.3(8) and 20 U.S.C. § 1414(d) as a consequence of being identified as a child with a disability.

10. In determining the educational placement of a child with a disability, the Respondent must ensure that the placement is in the least restrictive environment (LRE). That is, to the maximum extent appropriate, children with disabilities must be educated with children who are nondisabled. Further, special classes, separate schooling, or other removal of children with disabilities from the regular education should occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. 34 C.F.R. 300.114.

11. Under the LRE requirements of the IDEA, the placement must be (1) determined at least annually; (2) based on the child's IEP; and (3) as close as possible to the child's home. In selecting the LRE, consideration must be given to any potential harmful effect on the child or on the quality of services that he or she needs. 34 C.F.R. 300.116.

12. Placement decisions are to be made on the basis of the individual *Student*'s educational needs as stated in the IEP. The principal determinants in selecting the program or service for each child shall be goals of the child's IEP. 16 N.C.A.C. .1510C.

13. In this case, *Student* demonstrated serious behavioral difficulties which Respondent attempted to address in the regular classroom setting. The evidence shows that the nature and severity of *Student*'s disability is such that he can not be satisfactorily educated in the regular classroom even with the use of supplementary aids and services.

14. In order to determine whether a *Student* has been provided a FAPE, it must be determined whether there has been compliance with the procedures set forth in the IDEA and whether the IEP developed through those procedures is reasonably calculated to enable the child to receive educational benefits. *Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 458 U.S. 176, 206 (1982). The evidence also shows that the 2007-08 IEP developed by Respondent for *Student* which includes placement in a separate classroom is reasonably calculated to enable him to receive educational benefit.

15. The Petitioner has failed to satisfy her burden of establishing, by a preponderance of the evidence that Respondent denied *Student* a FAPE through its determination that he was eligible for special education and related services in the category of Behaviorally-Emotionally Disabled. The Petitioner has failed to satisfy her burden of establishing, by a preponderance of the evidence, that Respondent denied *Student* a FAPE through the 2007-08 IEP which proposes a placement in a separate classroom.

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the undersigned makes the following:

DECISION

The Undersigned finds that Petitioners have failed in their burden of proof regarding substantial error by Respondent that would deny a free appropriate public education to *Student*. The Respondent acted lawfully and consistent with the Individuals with Disabilities Education

Act through its determination that *Student* was eligible for special education and related services in the category of Behaviorally-Emotionally Disabled and through the 2007-08 IEP which provides for placement in a separate classroom. Respondent's IEP and placement of *Student* was appropriate to address his special needs so as to provide him with FAPE in the least restrictive educational environment.

NOTICE

In accordance with the Individuals with Disabilities Education Act (as amended by the Individuals with Disabilities Education Improvement Act of 2004) and North Carolina's Education of Children with Disabilities laws, the parties have appeal rights.

Under North Carolina's Education of Children with Disabilities laws (N.C.G.S. §§ 115C-106.1 et seq.) and particularly N.C.G.S. § 115C-109.9, "any party aggrieved by the findings and decision of a hearing officer under G.S. 115C-109.6 (a contested case hearing). . . may appeal the findings and decision within 30 days after receipt of notice of the decision by filing a written notice of appeal with the person designated by the State Board under G.S. 115C-107.2(b)(9) to receive notices." The State Board, through the Exceptional Children Division, shall appoint a Review Officer who shall conduct an impartial review of the findings and decision appealed.

Inquiries regarding further requirements of appeal rights, notices and time lines, should be directed to the Exceptional Children's Division of the North Carolina Department of Public Instruction, Raleigh, North Carolina.

IT IS SO ORDERED.

This the 19th day of December, 2007.

Augustus B. Elkins II
Administrative Law Judge

